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**IN THE  
COURT OF APPEALS OF INDIANA**

ANN MARIE AGOSTINO n/k/a  
ANN MARIE SABINO,

Appellant,

VS.

FRANK JAMES AGOSTINO,

Appellee.

) ) ) ) ) ) ) ) ) )

No. 71A03-0609-CV-423

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT

The Honorable Michael Gotsch, Judge

Cause No. 71C01-0406-DR-288

**April 4, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Appellant Ann Marie Agostino (“Wife”) appeals from the St. Joseph Circuit Court’s judgment ordering an unequal division of marital property in favor of her former husband, Frank James Agostino (“Husband”) and denying her request for attorney’s fees. Concluding that the trial court’s rationale for an unequal division of property does not rebut the statutory presumption that an equal division of property is just and reasonable under the facts of this case, we reverse in part, affirm in part, and remand with instructions.

### **Facts and Procedural History**

Husband and Wife were married on September 30, 2000, in St. Joseph County, Indiana. No children were born of the marriage. Wife filed a petition for dissolution of marriage on June 15, 2004. On May 25, 2005, Husband filed a motion to bifurcate issues of dissolution and property settlement. On June 1, 2005, the trial court entered a decree of dissolution, but retained jurisdiction over the division of the marital assets. On May 1, 2006, the trial court issued its judgment that contained, in pertinent part, the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

1. The parties were married on September 30, 2000, and separated on June 14, 2004.
2. [Wife] filed this cause of action for dissolution of marriage on June 15, 2004.

\* \* \*

4. By agreement of the parties, this Court bifurcated the issues of dissolution of marriage and division of property.
5. As there existed an irretrievable breakdown in the marriage of the parties, this Court entered a decree of dissolution ... on June 1, 2005, but retained jurisdiction over the division of the marital estate.

\* \* \*

7. No children were born during the marriage and neither party has any children.
8. The Husband has a bachelor degree in accounting and a juris doctor in law, and he is presently employed in the private practice of law in St. Joseph County, Indiana. Based on the evidence presented at trial, the Husband earns between \$50,000 and \$60,000 per year.
9. The Wife has a bachelor degree and a master's degree in speech pathology, and has worked as a speech pathologist in both Ohio and Indiana. Based on her prior employment, the Wife is capable of earning between \$24,000 to \$30,000 per year. During the marriage, the Wife worked part-time for the South Bend Community School Corporation and maintained the marital home. During the pendency of this cause of action, the Wife relocated to Columbus, Ohio.
10. The parties have accumulated certain real and personal property during the course of their marriage, which property should be divided in a fair manner.
11. During the marriage, the parties resided at 50745 Partridge Woods, Granger, Indiana. The Husband purchased this property in July of 2000, in anticipation of marriage to the Wife. This property has been sold, but a mortgage indebtedness existed on the property at the time of the sale. In addition, the parties incurred other expenses related to the sale of the property. The valuation of the real estate and the mortgage indebtedness are reflected below.
- [12.]<sup>1</sup> The parties own various banking, investment and retirement accounts, and the valuation of these accounts are reflected below.[13.] Each of the parties has a motor vehicle: the Wife has a 2002 Mazda Tribute and the Husband has a 2000 Mazda Millenia, and the valuation of these vehicles is reflected below.
- [14.] The parties own other tangible property, and the parties have already divided this property between them. The items of personal property that have not been delineated by either or both of the parties shall become the property of the party in possession of that item. The items that have been delineated by the [sic] either or both of the parties are considered a part of the marital estate, and the valuation of these items of personal property is reflected below.
- [15.] During the course of their marriage, the parties accrued the following Marital Assets and Liabilities:

***MARITAL ASSETS*** (Note: valuation set at or near the date of dissolution)

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<sup>1</sup> At this point, the findings of facts set forth in the trial court's judgment contain several mistakes in the sequential order. However, the trial court's entire judgment appears to be intact, thus we deem this scrivener's error to be inconsequential to our resolution of this appeal.

petition):

1. Real Estate @ 50745 Partridge Woods, Granger, IN 46530:	\$193,000.00
2. Bank Accounts (increase in value during marriage):	\$82,976.00
a. 1 <sup>ST</sup> Source Bank Account:	\$73,881.00
b. National City Bank Account (#1):	\$8,420.00
c. National City Bank Account (#2):	\$675.00
3. Investment Accounts (growth during marriage) <sup>2</sup> :	
a. Vision-Refco:	\$20,000.00
b. Smith Barney:	\$953.00
c. Italtbro:	0.00+
d. Amital:	0.00+
e. Immobiliari:	0.00+
4. Retirement Accounts (Wife's PERF Plan):	\$2,073.00
[5.] Vehicles:	\$20,520.00
a. 2000 Mazda Millenia (good condition)	\$8,520.00
b. 2002 Mazda Tribute (good condition)	\$12,000.00
[6.] Personal Property:	\$12,880.00
a. Personal Property attributed to Wife:	\$8,670.00
b. Personal Property attributed to Husband:	\$4,210.00
<b><i>TOTAL MARITAL ASSETS:</i></b>	<b>\$332,402.00</b>
<b><i>MARITAL LIABILITIES:</i></b>	
1. Note and Mortgage on Real Estate <sup>3</sup> :	\$135,981.00
2. Realtor Commission (6%) of sale:	\$11,580.00
<b><i>TOTAL MARITAL LIABILITIES:</i></b>	<b>(\$187,526.00)</b>
<b><i>NET MARITAL ESTATE TO BE DIVIDED:</i></b>	<b>\$184,841.00</b>

<sup>2</sup> The "+" symbol contained in this section of the trial court's decree directed us to the following statement contained in a footnote: "Wife makes no claim on Husband's investments in these businesses, which were owned prior to marriage." Appellant's App. p. 10.

<sup>3</sup> We note that the record shows that the mortgage amount is \$135,891.44. See Tr. pp. 18, 88.

### CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of this cause of action.
2. The Indiana Code provides that the court “shall presume that an equal division of the marital property is just and reasonable.” *See Indiana Code* 31-15-7-5. However, this presumption may be rebutted by a party who presents relevant evidence that an equal division would not be just and reasonable, including:
  - a. The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing;
  - b. The extent to which the property was acquired by each spouse before the marriage or through inheritance or gift;
  - c. The economic circumstances of each spouse at the time the disposition of the property is to become effective;
  - d. The conduct of the parties during the marriage as related to the disposition or dissipation of their property; and[,]
  - e. The earnings or earning ability of the parties as related to a final division of the property and a final determination of the property rights of the parties.

*Id.*

3. As the Court is using present valuations, the Court finds that there is no present tax consequence to division of the marital estate and that any future tax consequence is speculative at best. Accordingly, the Court does not subtract any value from the present value of the pension or other retirement accounts.
4. The Wife should keep as her separate tangible personal property, all personal property (including any property for which value has not been established by evidence at trial) that she now has in her possession and hold Husband harmless of any liability thereon.
5. The Husband should keep as his separate tangible property, all such property (including any property for which value has not been established by evidence at trial) that he now has in his possession and hold Wife harmless of any liability thereon.
6. The Husband should keep as his separate property the 2000 Mazda

Millenia sedan and Wife should keep as her separate property the 2002 Mazda Tribute sedan. Each of the parties should be responsible for such vehicle in his or her possession and hold the other party harmless thereon.

7. Based on the evidence presented at trial, at the time of the marriage, the Wife's debts exceeded her assets. The Husband made significant payments to the Wife during the course of their engagement and marriage. For example, the Husband retired the Wife's educational debt in the amount of \$9,106.00 and the Wife's motor vehicle lease in the amount of \$4,824.00. As a consequence, the Wife's net worth on a percentage basis has significantly increased since the inception of the parties' marriage.
8. Due to the length of the marriage, the substantial contribution of the Husband to the Wife's premarital debts and the unequal contribution of the Husband to the marital estate in both assets and income both before and during the course of the marriage, the Court concludes that an equal division of the marital estate would not be "fair and reasonable" under the present circumstances. Accordingly, based on the evidence presented at trial, the Court concludes that it would be fair and reasonable to divide the marital estate unevenly with the Husband receiving approximately eighty percent (80%) and the wife receiving approximately twenty [percent] (20%) of the marital estate. The specific division of the marital estate is as follows:

### ***DIVISION OF ASSETS AND LIABILITIES***

#### **A. Wife's Assets**

1. National City Bank Account (#1):	\$8,420.00
2. National City Bank Account (#2):	\$675.00
3. PERF Retirement Plan:	\$2,073.00
4. Personal Property attributed to Wife:	\$8,670.00
5. 2002 Mazda Tribute (good condition):	\$12,000.00
6. Cash (to be paid from Real Estate proceeds):	\$5,439.00

***TOTAL ASSETS TO WIFE:*** **\$37,277.00**

#### **B. Husband's Assets**

1. Net Proceeds from sale of Real Estate:	\$40,000.00
2. 1 <sup>st</sup> Source Bank Account:	\$73,881.00

3. Investment Accounts:	\$20,953.00
4. 2000 Mazda Millenia (good condition)	\$8,520.00
5. Personal Property attributed to Husband:	\$4,210.00

***TOTAL ASSETS TO HUSBAND: \$147,564.00***

***NET MARITAL ESTATE DIVIDED BETWEEN THE PARTIES:***

***\$184,841.00***

9. Each party should bear their own costs associated with legal representation in this matter, and no order of attorney fees [is] entered.

**ORDER AND JUDGMENT**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above FINDINGS OF FACT and CONCLUSIONS OF LAW are incorporated by reference and adopted as the ORDER AND DECREE of this Court. . . .

Appellant’s App. pp. 8-14. This appeal ensued.

**Standard of Review**

Initially, we note our standard of review. The division of marital assets is within the trial court's discretion, and we will reverse only for an abuse of discretion. McCord v. McCord, 852 N.E.2d 35, 43 (Ind. Ct. App. 2006). A party challenging the trial court’s division of marital property must overcome a strong presumption that the trial court “considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal.” Id. at 43-44. “We may not reweigh the evidence or assess the credibility of the witnesses, and we will consider only the evidence most favorable to the trial court’s disposition of the marital property.” Id. at 44. We observe that although the trial court directed both parties to

submit proposed findings and conclusions, it did not do so pursuant to a request of either party under the provisions of Indiana Trial Rule 52(A).

When findings and conclusions thereon are entered by the trial court upon request of any party to the action, we apply a two-tiered standard of review. Maloblocki v. Maloblocki, 646 N.E.2d 358, 361 (Ind. Ct. App. 1995). First, we determine whether the record supports the findings and, second, whether the findings support the judgment. Granzow v. Granzow, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006). In that instance we are bound by the findings made by the trial court, and we will reverse where the findings are clearly erroneous, that is, where the findings are unsupported by the evidence. Maloblocki, 646 N.E.2d at 361. However, where, as here, the trial court enters findings and conclusions on its own motion, our standard of review is slightly altered. Id. Where the trial court enters sua sponte findings of fact, we review those findings under the same standard we would use if the parties requested them. Nunn v. Nunn, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003). However, on those issues, which the trial court has not found, or for which the findings are inadequate, we treat the judgment as a general one. Maloblock, 646 N.E.2d at 361; see also Humphries, 789 N.E.2d at 1030. Thus, rather than being bound by the trial court's findings, or lack thereof, we examine the record and affirm on any theory the evidence of record supports. Id. at 362; see also Maloblocki, 646 N.E.2d at 361. In so doing, we neither reweigh the evidence nor judge witness credibility, for that is particularly the function of the trial court. Id.



## Discussion and Decision

### *I. Division of Marital Estate*

Initially, Wife asserts that the trial court improperly divided the marital estate because the court's reasons for an unequal distribution of property in favor of Husband are inadequate. Specifically, Wife argues:

The trial court abused its discretion in deviating from an equal division of the marital estate by awarding Husband eighty percent (80%) and Wife twenty percent (20%) where the Husband had superior earnings as an attorney and an accountant, where Wife worked steadily throughout the marriage and contributed to the parties' finances, and where Wife made substantial non-monetary contributions in maintaining the marital home.

Brief of Appellant at 11. We agree.

The trial court's discretion in the disposition of marital property is subject to the statutory presumption for equal distribution. Newby v. Newby, 734 N.E.2d 663, 668 (Ind. Ct. App. 2000). However, the presumption that an equal division of marital property would be just and reasonable may be rebutted by a party who presents relevant evidence concerning the following factors, enumerated in Indiana Code section 31-15-7-5 (1998), that an equal division would *not* be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
  - (A) before the marriage; or
  - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

- (5) The earnings or earning ability of the parties as related to:  
    (A) a final division of property; and  
    (B) a final determination of the property rights of the parties.

Id.

In the exercise of its discretion to divide the marital property unequally, the trial court must set forth its reasons for doing so. Galloway v. Galloway, 855 N.E.2d 302, 305 (Ind. Ct. App. 2006). If the reasons justifying an unequal distribution are clearly against the logic and effect of the facts and circumstances before the court, we will reverse. Maloblocki, 646 N.E.2d 362.

In the case before us, the trial court awarded Husband approximately eighty percent of the marital property. In so doing, the trial court made the following pertinent conclusions:

7. Based on the evidence presented at trial, at the time of the marriage, the Wife's debts exceeded her assets. The Husband made significant payments to the Wife during the course of their engagement and marriage. For example, the Husband retired the Wife's educational debt in the amount of \$9,106.00 and the wife's motor vehicle lease in the amount of \$4,824.00. As a consequence, the Wife's net worth on a percentage basis has significantly increased since the inception of the parties' marriage.
8. Due to the length of the marriage, the substantial contribution of the Husband to the Wife's premarital debts and the unequal contribution of the Husband to the marital estate in both assets and income both before and during the course of the marriage, the Court concludes that an equal division of the marital estate would not be "fair and reasonable" under the present circumstances. Accordingly, based on the evidence presented at trial, the Court concludes that it would be fair and reasonable to divide the marital estate unevenly with the Husband receiving approximately eighty percent (80%) and the wife receiving approximately twenty (20%) of the marital estate.

Appellant's App. pp. 12-13. The record reveals, and the trial court specifically found, that Wife worked part-time for the duration of the marriage as a speech pathologist and that she was responsible for maintaining the marital home. Tr. pp. 30, 32-33; Appellant's App. p. 9. Additionally, contrary to the trial court's conclusion that Husband retired Wife's premarital educational debt of \$9,106.00, uncontroverted evidence clearly shows Wife's premarital debt was retired with joint marital funds.

Husband testified the majority of payments made for Wife's educational debt "mostly came from the joint account." Tr. p. 112. Husband also submitted to the trial court proposed findings of fact which stated "[Wife] brought to the marriage a motor vehicle lease debt which was paid during the marriage from the parties['] joint earnings totaling \$4,824.00." Appellant's App. p. 25. Moreover, Wife repeatedly testified that at the beginning of the marriage, she gave all her paychecks to Husband, who paid all the bills, and that she did not open her own bank account until the educational loan was paid off. Tr. pp. 37-38, 55. This testimony was confirmed by Husband's Exhibit BB showing that the student loan was paid off on December 20, 2001, and Husband's testimony that Wife did not open her own separate account until February of 2002. Id. p. 113. Thus, uncontroverted evidence clearly shows that marital funds, not Husband's funds alone, retired Wife's premarital debt.

Likewise, the fact that Husband brought certain financial assets to the marriage does not justify the trial court's 80/20 division of the marital estate in Husband's favor under the facts of this case. The record shows that prior to marriage, Husband owned certain bank accounts and investments. However, Husband received "credit" for bringing

these assets into the marriage when the trial court included in the marital estate *only the increase in the value of said assets during the marriage*, as opposed to including the total value of the assets at the time of dissolution. See Appellant's App. p. 10.

With regard to assets acquired prior to marriage, this court has previously held that "the trial court may achieve a just and reasonable property division by determining the appreciation over the course of the marriage of such assets and dividing the appreciation between the spouses, while setting over to the appropriate spouse the pre-marriage value of the assets at issue." Doyle v. Doyle, 756 N.E.2d 576, 579 (Ind. Ct. App. 2001); see also Newby, 734 N.E.2d at 670 (concluding that the trial court did not abuse its discretion when it determined the value of the marital assets at the time of marriage and then ordered any increase or appreciation in the value of the marital assets during the course of the marriage to be *equally* shared). Here, however, the trial court not only assigned the pre-marriage value of Husband's assets to Husband by only including the appreciation of said assets in the marital estate, but it also awarded Husband eighty percent of the appreciation accumulated during the marriage. This is not a just and reasonable distribution under the facts before us in the record.

Moreover, while it is true that Husband provided a greater percentage of the family income during the marriage, this fact alone does not justify an unequal distribution of the marital estate. Marriage is to be considered a partnership in which profits are presumed to be shared equally even though one partner contributed more in income. Maloblocki, 646 N.E.2d at 363. Certainly, the contribution of one spouse to the acquisition of marital property may be considered as a factor demonstrating that an equal

distribution would not be just and reasonable. Id. However, under the facts of this case, there is no indication why Husband's greater income producing ability should affect the distribution of marital property.

As stated previously, the evidence supports the trial court's finding that Wife worked part-time for the duration of the marriage as a speech pathologist, and that she was also responsible for the maintenance of the marital home. "The income-producing efforts and intangible contributions of both spouses unite to facilitate the acquisition of marital property." Id.; see also Indiana Code § 31-15-7-5(1) (when determining whether the marital property should be distributed unequally, the court should "consider the contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing"). Accordingly, courts are not limited to assessing the financial contributions made by each spouse during the course of the marriage but can, and should, consider non-income producing contributions as well. See Seslar v. Seslar, 569 N.E.2d 380, 382-83 (Ind. Ct. App. 1991) (holding that "marriage is to be considered as a partnership – where profits are presumed to be shared equally – even though one partner contributes more in income[;] [t]his is justified by consideration of the other partner's less tangible – but equally valuable—contributions to the relationship and marriage).

Husband's contribution of a greater share of the funds to the marriage here does not necessarily mean that he made a larger contribution to the acquisition of the marital property. Maloblocki, 646 N.E.2d at 363. Therefore, the trial court's unequal division of marital property cannot be sustained on the rationale contained in its conclusions set forth

above. See Appellant's App. pp. 11-13.

Finally, we note that the trial court's findings do not provide this court with sufficient information for a meaningful review of the trial court's mathematical computations and conclusions. For example, the trial court assigned Husband \$40,000.00 as the "Net Proceeds from Sale of Real Estate" but the value it assigned to the marital home (\$193,000.00), less the note and mortgage (\$135,981.00), and realtor commission (\$11,580.00) totals \$45,439.00. See Appellant's App. pp. 10-11, 13. Likewise, there are insufficient findings of fact for this court to determine how the trial court arrived at a "total marital liabilities" value of \$187,526.00 when the trial court's enumerated marital liabilities contained in its findings only totaled \$147,561.00. See Appellant's App. p. 11.

In sum, the trial court's rationale does not rebut the statutory presumption that an equal division of property is just and reasonable under the facts of this case. Moreover, the trial court's findings are insufficient for this court to conduct a meaningful review of the trial court's mathematical computations and conclusions. For the foregoing reasons, we must reverse on this issue and remand with instructions that the trial court supplement its findings of fact and conclusions of law and thereafter enter an order dividing the marital estate in accordance with this opinion.

## ***II. Attorney's Fees***

Wife next contends that the trial court abused its discretion in failing to award her attorney's fees. Specifically, Wife asserts that the trial court failed to consider Husband's far superior earnings as an attorney and accountant, and that the trial court failed to adequately consider Husband's conduct throughout the divorce case, which resulted in

substantial discovery and consequently higher attorney's fees. Br. of Appellant at 10.

When awarding attorney's fees, the trial court "must consider the resources of the parties, their economic conditions, the ability of the parties to engage in gainful employment, to earn adequate income, and other factors that are pertinent to the reasonableness of the award. Kondamuri v. Kondamuri, 852 N.E.2d 939, 953 (Ind. Ct. App. 2006). Additionally, Wife is correct that misconduct that directly results in additional litigation expenses may be properly taken into account in the trial court's decision to award attorney's fees, see Hendricks v. Hendricks, 784 N.E.2d 1024, 1028 (Ind. Ct. App. 2003). However, Indiana Code section 31-15-10-1 (1998) provides that a trial court "*may* award attorney's fees at any stage of the dissolution proceeding." (Emphasis added). Thus, this statute affords the trial court broad discretion in assessing attorney's fees, but does not mandate the trial court assess attorney fees in the first instance. Maloblocki, 646 N.E.2d at 364. Although the facts and reasonable inferences might lead us to a different conclusion in this case, we will not substitute our judgment for that of the trial court. There is no abuse of discretion for the trial court not to do that which it is not required to do. Id.; see also Rump v. Rump, 526 N.E.2d 1045, 1047 (Ind. Ct. App. 1988), trans. denied.

### **Conclusion**

In sum, we conclude that on the facts of the present case, the trial court's rationale for awarding Husband eighty percent of the marital estate does not rebut the statutory presumption that an equal division of property is just and reasonable as required by Indiana Code section 31-15-7-5. We further conclude that while Indiana Code section

35-15-10-1 affords the trial court broad discretion in determining whether to award attorney's fees in a dissolution proceeding, it does not require the trial court to do so. Accordingly, we reverse and remand with instructions to revise the dissolution decree consistent with this opinion and to determine a just and reasonable division of the marital estate in light of that revision.

Affirmed in part, reversed in part and remanded with instructions.

NAJAM, J., and MAY, J., concur.